BEFORE THE
OFFICE OF IMPORT ADMINISTRATION
INTERNATIONAL TRADE ADMINISTRATION
DEPARTMENT OF COMMERCE
WASHINGTON, D.C. 20230

Case No. A-821-816
Inquiry Into the Status of the Russian Federation as a Non-Market Economy Country Under the Antidumping and Countervailing Duty Laws

INQUIRY INTO THE STATUS OF THE RUSSIAN FEDERATION AS A NON-MARKET ECONOMY UNDER THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

ADDITIONAL COMMENTS OF BETHLEHEM STEEL CORPORATION; NATIONAL STEEL CORPORATION; AND UNITED STATES STEEL CORPORATION

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-70004

DEWEY BALLANTINE LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605
(202) 862-1000

February 28, 2002

The submission by Russian steel producers filed with the U.S. Department of Commerce on February 7, 2002, with more than 75 percent of document consisting of new information, was not a rebuttal to comments submitted in initial briefs but rather a submission of new information. This submission must be viewed by the Department with a healthy dose of skepticism as the document is rife with misquotation, mischaracterization, and claims completely unsupported by evidence. Notably, the evidence that is provided is not of the caliber relied upon by the Department in its previous non-market economy determinations: The glaring absence of reputable sources like the World Bank, the International Monetary Fund (IMF), European Bank for Reconstruction and Development (EBRD) and the Organization for Economic Cooperation and Development (OECD) highlight the weakness of Russian steel producers' claims. Additionally, Russian producers fail to provide exhibits for approximately one-third of the citations in the submission. Considering that some of the Russian steel producers' new contentions are completely contrary to the position argued in their initial submission, it becomes even more clear how much new information is in this document.[1] Unfortunately, these instances are not isolated, but instead demonstrate a general pattern of unreliability of the Russian producers' submission.

Because this information was not submitted in a timely fashion, Domestic Producers are now responding to the most egregious new information submitted by Russian producers.[2] Russian steel producers' submission is organized so that direct rebuttals are contained in part A of each section, while parts B and C are characterized by Russian steel producers, as a "detailed exposition."[3] Even the "rebuttal" sections, however, contain a significant amount of new information, including a considerable amount that is blatantly inaccurate.

I. <u>Misrepresentations, Misquotations, and Unsupported Claims</u>

Much of the new information submitted by Russian steel producers should be disregarded by the Department. The Department cannot accept the claims of the Russian steel producers, as many of these claims, including some on which major arguments turn, are unsupported, inaccurate, and often completely contradict the citation provided to support the claim. Notably, while the Ministry of Economic Development and Trade of the Russian Federation purports to support this submission, the Russian government has failed to supply relevant statistical data which is the only information that could possibly refute the conclusions of numerous, independent international organizations.

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1 For example, in Letter from Powell, Goldstein, Frazer & Murphy LLP to the U.S. Department of Commerce, Case No. A-821-816 at 11-12 (Dec. 10, 2002) ("Russian Steel Producers' Dec. 10"), Russian steel producers argue that tripartite labor agreements are a sign of a nonmarket economy, then in their February 7 submission, the opposite position is taken as tripartite agreements are offered as positive evidence that Russia has become a market economy. Letter from Powell, Goldstein, Frazer & Murphy LLP to the U.S. Department of Commerce, Case No. A-821-816 at 40-41 (Feb. 7, 2002) ("Russian Steel Producers' Feb. 7")

2 This new information accounts for approximately 113 pages of the 144 page submission.

3 Russian Steel Producers' Feb. 7 at 3.

A. Some of the Russian Steel Producers' Most Important Data are Groundless

The general problems with the submission are well illustrated with the following examples of Russian steel producers use of new claims lacking in foundation to support their arguments. One of the most egregious examples is the Russian steel producers' claim that the private sector accounted for 74.4 percent of the country's GDP in 2000. That is asserted without any citation whatsoever.[4] In fact, the relevant paragraph is structured to suggest that the cite provided at the end of the next sentence also refers to the 74.4 percent figure, but that is not true. The Russian steel producers spend the rest of the section discussing factors not directly relevant to the Department's determination. In sum, the figure in question is the single most important one on which the Russian producer's argument turns, and it is wholly unsupported.

B. Russian Producers' Exhibits Do Not Support Their Claims

While approximately one-third of the cited sources were not included as exhibits to the submission, several of the exhibits which actually were provided actually contradict the Russian claims which they purportedly support:

- At page 133, Russian steel producers cite to the Globalist Factsheet on Russia as support for the proposition that the enforcement of Russian bankruptcy laws is progressing positively.[5] However, this exhibit is a report criticizing the current state of the Russian Federation, including its bankruptcy laws, and instead supports Domestic Producers' contentions that the current law "makes it possible to avoid payment of taxes and to use bankruptcy proceedings as a means for re-division of property" (quoting Russian Prime Minister Kasyanov).[6]

- At page 9, Russian steel producers claim that a new progressive law regarding currency regulation was sent to the Duma and indicate that there is wide support for its passage. In fact, this law was rejected by the Duma on December 7, two months to the day before the Russian producers' submission.[7]

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4 Russian Steel Producers' Feb. 7 at 110.

5 "Globalist Factsheet: Our Top Facts on Russia," (Nov. 12, 2001), available at <http://www.theglobalist.org/nor/factsheets/2000/03-27-00.shtml> (Russian Steel Producers' Feb. 7 Exh. 56). Exh. 1.

6 "Government Session Reviews Amendments to Bankruptcy Law, Customs Code," *Moscow Kommersant* (Nov. 14, 2001) (also cited in Letter from Dewey Ballantine LLP and Skadden Arps to the U.S. Department of Commerce, Case No. A-821-816 at 50 (Dec. 10, 2001) ("Domestic Producers'")). Exh. 2. This view is far more optimistic than that of the Chief of Russia's Federal Financial Recovery and Bankruptcy Service (FFRBS), who stated in October 2001 that "the current bankruptcy law is the worst law ever passed in all of Russia's history." "Russian Federal Bankruptcy Service Chief Trefilova on Bankruptcy Law," *Moscow Vek* (Oct. 26, 2001) (also cited in Domestic Producers' at 49). Exh. 3.

7 See, infra, Criterion I at 6-7.

- At pages 59 and 61, Russian steel producers cite to "Country Commerce Russia" by the Economist Intelligence Unit ("EIU") to support the claim that the new Labor Code will resolve current problems. Instead, this report criticizes the state of labor relations in Russia, stating that "the Code's application is often very far from the high theoretical level of worker protection. Employers often find ways to get around the Labor Code's strict provisions by avoiding formal contracts or signing fictitious agreements."[8]

- At page 77, Russian steel producers claim that the U.S. Commercial Service, Country Commercial Guide Russia ("the Guide") discusses a 1997 law allowing "foreign arbitration awards to be enforced in Russia." However, such a discussion is not found at page 59 of the document, as claimed by Russian steel producers, or on any adjacent pages.

- In the same paragraph, on page 77, Russian steel producers selectively quote a sentence fragment from the Guide as proof that judicial reform is taking place, but fail to include the entire sentence, thereby completely altering its meaning. The Guide actually states, "While the trend towards a more independent, transparent and impartial judicial system is generally positive, *it cannot be taken for granted that several regional or local courts will deliver judgments free from financial or political persuasion.*"[9]

Such blatant misquotations by Russian steel producers pervade their submission and are clearly not attributable to clerical error. For example, Russia steel producers claim that Domestic Producers' submission stated:

> *the Ministry of Finance and the Ministry of Economic Development and Trade were reportedly jointly tasked with preparing <u>legislation to liberalize currency regulation but that initiative died, bringing efforts to reform the currency controls to a dead stop</u>.*[10]

However, the quote actually states:

> *In mid-2001, the Ministry of Finance ("Misfin") and the Ministry of Economic Development and Trade were reportedly jointly tasked with preparing <u>a "liberal law on currency regulation" which was to have gone into effect in 2002</u>.*[11]

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8 Economist Intelligence Unit, "Country Commerce Russia," (Nov. 2001) at 53 ("EIU") (Russian Steel Producers' Feb. 7 Exh. 19). Exh. 4.

9 U.S. Commercial Service, Country Commercial Guide Russia Fiscal Year 2002 (July 15, 2001) at 9 ("Country Commercial Guide Russia") (Russian Steel Producers' Feb. 7 Exh. 18) (emphasis added). Exh. 5.

10 Russian Steel Producers' Feb. 7 at 9.

11 Domestic Producers' at 10.

C. Russian Steel Producers' Charts are Misleading and Inaccurate

In sections C of the statutory criterion discussions, Russian steel producers include numerous charts and graphs purportedly supporting the claims in their discussions. Upon closer examination, these charts do not address the statutory issues, nor even the claims made by the Russian steel producers. The following examples illustrate why these charts should be disregarded by the Department.

- Charts, like Figure 9, 10 and 32 that discuss GDP growth and market capitalization in dollars, fail to account for the massive inflation that Russian has experienced.[12] Therefore, data from these charts must be adjusted to GDP in real terms to have any meaning.

- Figure 17 is presented as "evidence" of the distribution of foreign direct investment throughout Russia.[13] Not only is this table uninformative -- since the use of percentages belies the fact that FDI levels in Russia are abysmal -- it also fails to define what each sector includes. Additionally, any claim that this FDI is going to the private sector are rebutted by Russia steel producers' own submission. Because Russian steel producers later admit that the natural gas, oil and telecommunications sectors are natural monopolies controlled by the government,[14] the percentage of FDI going to "fuel" and "communications" sectors, as identified by this chart, is not going to private enterprise, *but to the government owned or controlled enterprises.* Contrary to the Congressional intent behind examining FDI in NME countries, Russian FDI levels do not represent the actual openness of the private market.

- Figure 19 is misleading and false.[15] It presents data for 1997-2002 foreign direct investment ("FDI") per capita as estimates, but the numbers are either outdated or misstated, as the real FDI per capita levels are far lower. As cited in Domestic Producers' December 10, 2001 submission, the actual 2001 FDI per capita was $14, according to the EBRD, not $34.58 as the Russian steel producers' estimate claims.[16]

- In Figure 7 Russian steel producers attempt to show that capital flight from Russia is decreasing by showing that it was a decreasing percentage of Russian trade surplus in 1998-2000. They fail to mention that the Russian trade surplus grew significantly in

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12 Russian Steel Producers' Feb. 7 at 55, 56, 138.

13 *Id.* at 90.

14 *Id.* at 98.

15 *Id.* at 92.

16 *See, infra* discussion of EBRD FDI per capita data at 11. *Transition Report 2001: Energy in Transition*, European Bank for Reconstruction and Development (2001) at 189 ("*Transition Report 2001*"). Exh. 18. *See also* Domestic Producers' at 22.

those years as well. Therefore, the decrease in capital flight real terms has been fairly small.

D. One-third of the Citations are Not Provided in Exhibits

Finally, the Russian steel producers' submission is replete with citations that are important to the arguments being made, but the sources cited are not provided in the Exhibits section. For example, in their Criterion 5 section's new information subsection, they fail to provide exhibits for twelve citations of Russian federal laws and regulations.[17] This problem extends to the rebuttal sections as well. In the Criterion 3 section the Russian steel producers make no less than ten citations to eight recent Russian federal laws and one judicial note that are not provided in the Exhibits in English or even in the original Russian.[18] The Russian steel producers rely in many of their arguments on claims that relevant Russian laws have been updated and improved. The failure to provide those documents in the Exhibits section prevents DOC from considering the cited material and assessing whether these Russian claims are accurate.

II. Analysis and Limited Rebuttal of New Information

As stated previously, due to the time constraints of this non-market economy review, the following rebuttal comments are directed solely at certain new information untimely submitted by Russian steel producers. This discussion is not intended to be exhaustive, but instead to highlight the general weakness and inaccuracy of the new information submitted February 7, 2002.

One general comment is warranted at the onset. Most of the new factual information submitted by Russian steel producers addresses the *de jure* state of affairs in Russia rather than the *de facto* situation that is far more important to the Department's determination of market economy status. As defined in narrow economic terms by Congress when the statute was drafted, a "non-market economy" is:

> *any foreign country that Commerce determines does not operate on market principles of cost or pricing structures, so that sales in the country do not reflect the fair value of the goods.*[19]

Clearly, the actual state of affairs in Russia is more important to the Department's determination than purported legislative progress. This is especially true in Russia, which has a mixed history of successful implementation of important legislative measures.[20]

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17 Russian Steel Producers' Feb. 7 at footnotes 273, 275, 276, 292-300.

18 *Id.*, footnotes 159, 161, 162,165, 168, 170, 172, 176-178.

19 *Omnibus Trade and Competitiveness Act of 1988: Conference Report*, Pub. L. No. 100-418, v. 5, 591 (Apr. 20, 1988) (also cited in Domestic Producers' at 4) (emphasis added). Exh. 17.

20 "Scratch and sniff: Russia's economic recovery is more fragile than it seems," *Economist* (Feb. 14, 2002). Exh. 6.

Criterion 1: The extent to which the currency of the foreign country is convertible into the currencies of other countries.

Certain important uncertainties remain. For example, the submission claims that Russia accepted the obligations under Article VIII of the IMF Articles of Agreement and that the Russian Constitution establishes superiority of Russia's treaties over conflicting provisions of domestic law.[21] However, it is not certain whether the agreement in question rises to the status of a treaty under Russian law. In addition, given the spotty record of implementation of judicial decisions in Russia, even those from the highest court in the land, it is not at all clear that a court ruling resolving a conflict of laws in favor of an international obligation would actually be enforced.[22]

This section also demonstrates why the Department should be extremely cautious in accepting and relying on the information submitted by the Russian steel producers. They argue that, contrary to the Domestic Producers' earlier submitted information, the Russian Ministries of Finance and Economic Development and Trade had succeeded in agreeing on a joint draft of a new law on currency regulation that would completely remove the requirement of surrender of foreign currency earnings in three to five years and submitted it to the Russian Duma.[23] They clearly imply that the passage of the law seemed likely as of the date of the submission and that the pressure for its passage was building up.[24]

Instead, this claim is just another small brick in the larger house of inaccuracies and misrepresentations built by the submission. The draft of the law was indeed submitted to the Russian Duma, although in late October rather than in November, and it contained provisions on ending the surrender requirements.[25] It also contained provisions regarding obligatory control over currency transactions exceeding a certain sum that was not even specified by the law.[26] Therefore, the law was not as progressive in terms of liberalization of currency controls as the Russian steel producers' submission suggested. Regardless, the bill is dead because in early December "following the recommendation of the State Duma Budget and Taxes Committee," the Russian Government recommended that that the draft law "be returned back to the procedure of the first reading and rejected."[27]

21 Russian Steel Producers' Feb. 7 at 11-12.

22 *See infra* pp.8-9.

23 *Id.* at 9-10.

24 *Id.*

25 "The Concept of New Law on Currency Control and Currency Regulation Proposed by Ministry of Finance," Deloitte & Touche CIS Legislative Tracking (Oct. 19, 2001), available at <http://www.deloitte.ru/LTArchive/lt(191001)e.html>. Exh. 7.

26 *Id.*

27 "The Draft Law on the Obligatory Control Over Certain Currency Transactions has been Rejected," Deloitte & Touche CIS Legislative Tracking (Dec. 7, 2001), available at <http://www.deloitte.ru/LTArchive/lt(071201)e.html>. Exh. 8.

It is difficult to understand how those purporting to have performed the research for the submission failed to learn of the rejection of the law, especially given the fact that two entire months elapsed between the rejection of the bill and the date on which the submission was filed. This is yet another example of an important factual inaccuracy in the Russian submission that gives the Department cause for a more general skepticism.

Some of the economic data presented in Section C of the Criterion 1 is misleading and unreliable. For example, Russian steel producers claim that capital flight from Russia has substantially decreased in the years since the default crisis of 1998. The submission includes a graph where the capital flight is represented as a proportion of Russia's external trade surplus and decreases from 144 percent in 1998 to 59 percent in 1999, and to 29 percent in 2000.[28] Although these numbers look impressive, the graph is misleading.

Following the default crisis, the Russian ruble suffered a devaluation of several hundred percent. The ruble's weakness led to an increase in Russian exports, thus increasing Russia's trade surplus. The actual amounts of Russian capital flight for 1998-2000 provided in Figures 1 and 2 below show that the decrease been much smaller than the Russian producers' submission suggested.

Figure 1- Russia: Capital Flight

million of dollars

	Source	1998	1999	2000
Trade balance	a	$ 16,869	$ 36,129	$ 60,703
Flight as percent of trade surplus	b	144%	59%	29%
Implied capital flight	a * b	$ 24,291	$ 21,316	$ 17,604

Sources:
a. IMF *International Financial Statistics*, December 2001, page 712, line 78ac*d.*
b. Russian Steel Producers' Feb. 7 at 34.

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28 Russian Steel Producers' Feb.7 at 34 (Figure 7).

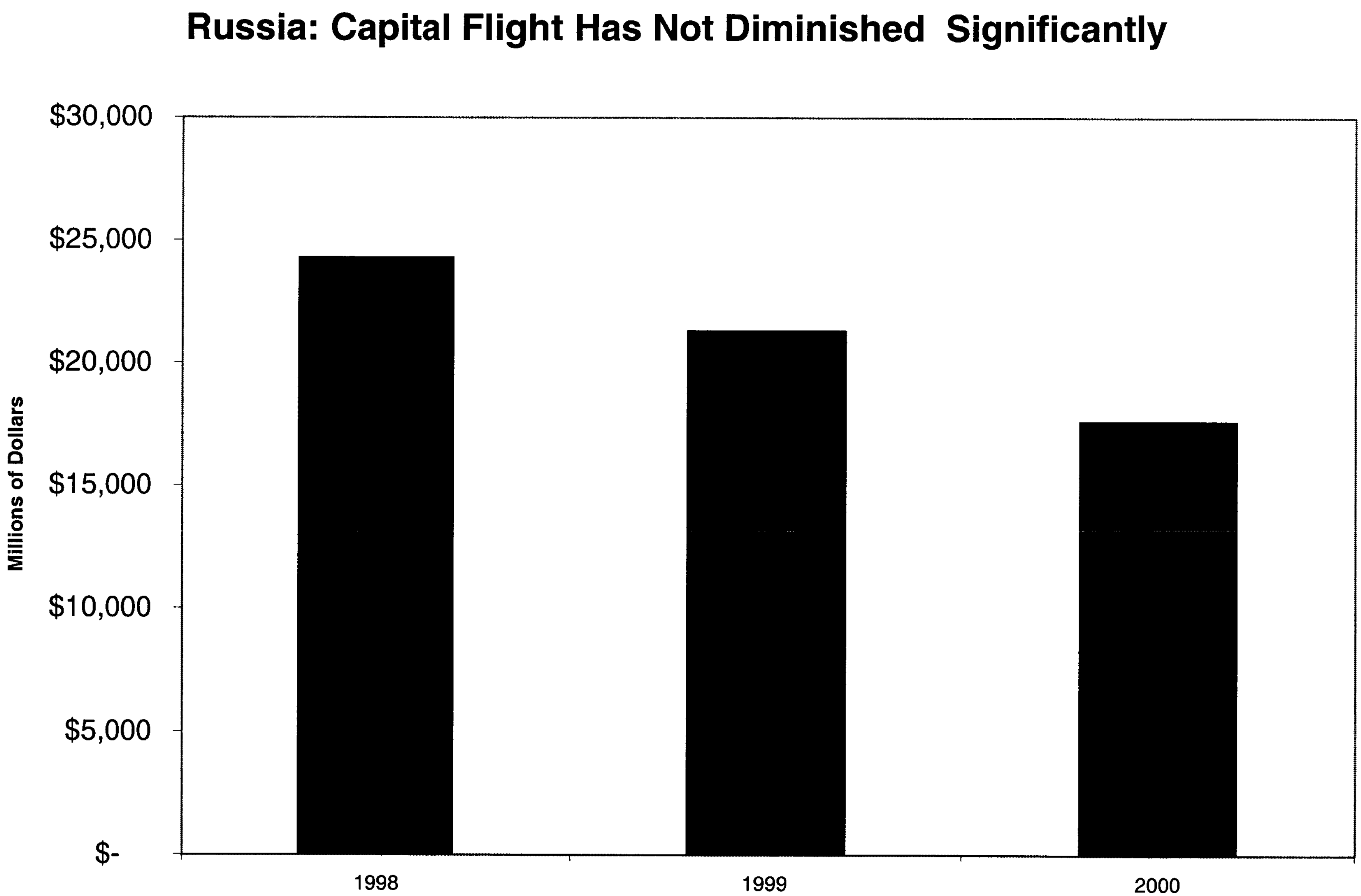

Figure 2 Russia: Capital Flight

Criterion 2: The extent to which wage rates in the foreign country are determined by free bargaining between labor and management.

A. Russia Has Not Improved Labor Rights In Fact

The new information submitted by Russian steel producers regarding labor rights relies almost entirely on the laws of Russia, and does not address the reality of the situation. This *de jure* versus *de facto* problem is best illustrated by information submitted by the Russian steel producers themselves. As noted in the earlier section discussing the misrepresentation of data, the Economist Intelligence Unit (EIU) actually criticizes Russia's new Labor Code. Instead of saying that the new Code will cause practical reforms, this article further emphasizes the fact that the *de jure* and *de facto* states of Russia are very different. Even though the law promises workers more protection, the law is not enforced or respected. For example, the law requires written contracts between employers and employees but, as succinctly stated by the EIU, "written employment contracts are mandatory but are often not the norm."[29]

B. Propiska is Alive and Well

Russian steel makers cite a plethora of laws, regulations, judicial decisions, and even the Russian constitution to support their assertions that Russia is a market economy, as evidenced by the state of labor relations.[30] If one believes the Russian steel producers' submission, once laws and judicial opinions are passed or implemented in Russia, the *de facto* situation changes accordingly and the rule of law prevails. However, this is not true. One good illustration of the fact that well-intentioned laws and judicial decisions in the Russian Federation are frequently not implemented properly, or at all, is the issue of freedom of movement. Despite the "establishment" of this right by three levels of federal law, as well as by judicial decisions of no lesser authority than the Supreme Court of the Russian Federation, this right is still not available to the intended beneficiaries.

The Russian steel producers' submission correctly states that the Russian Constitution guarantees freedom of movement to all persons.[31] In addition, the 1993 Law on Freedom of Movement in its opening article grants the right "to freedom of movement, choice of a place of stay and residence."[32] The Russian Civil Code also includes "the right to free movement" are among "non-material goods, belonging to citizens from birth" that are " inalienable." [33] Finally,

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29 EIU at 52. Exh. 4.

30 Russian Steel Producers' Feb. 7 at 44.

31 Constitution of the Russian Federation, Article 27 (Russian Steel Producers' Feb. 7 Exh. 1). Exh. 9.

32 Law of the Russian Federation No. 5242-1, "On the Right of Citizens of the Russian Federation to the Freedom of Movement, the Choice of a Place of Stay and Residence within the Russian Federation" (June 25, 1993). Exh. 10.

33 "Право свободного передвижения... и другие нематериальные блага, принадлежащие гражданину от рождения или в силу закона, неотчуждаемы..." Civil Code of the Russian Federation, Chapter 8, Article 150.

Russia's Constitutional Court, the highest court in the land, has ruled on three occasions in 1996, 1997, and 1998 that the *propiska* system was illegal and had to be abolished, and that at most,

> *"{r}egistration authorities have only the power to verify the citizen's act of free choice when he selects the place he will sojourn or live."*[34]

Such multi-layered levels of protection nominally afforded the fundamental right of freedom of movement would suggest that Russian citizens are indeed free to move around the country. Unfortunately, that is not true, and a number of regional and municipal governments continue to flaunt both federal law and judicial rulings with impunity. The most flagrant violator is also the most important one: the city and the *oblast*, or province, of Moscow. Following the latest Constitutional Court ruling in February 1998, Moscow Mayor Luzhkov defiantly stated that Moscow would not follow the ruling.[35] He has been true to his word.

Although the city of Moscow claims to have eventually complied with the rulings, all Russians know that gaining a *propiska* in Moscow is all but impossible due to a variety of inflexible rules that make it possible only for the wealthier and more connected applicants to secure the right to residency.[36] Moscow authorities used the August 1999 terrorist acts in Russia to defend Moscow's *propiska*, and as of early 2001, Moscow still maintained its *propiska* system.[37]

Such a failure of local government to comply with federal laws demonstrates that the Department must look beyond the pronouncements of the federal government when conducting the NME analysis. As discussed in Domestic Producers' original submission,[38] the text of the NME statute and the legislative history make it clear that all sectors of government, and all sectors of the economy, must be considered in an NME review.

C. The Right to Freely Strike is Gone

Russian steel producers claim that the new Labor Code ensures that "{t}hese {workers'} rights, protections, and entitlements collectively provide workers with the ability to withhold their labor and, hence, with the bargaining power to negotiate freely for wages with their

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34 Noah Rubins, *Recent Developments: The Demise and Resurrection of the Propiska: Freedom of Movement in the Russian Federation*, 39 HARV. INTL. L.J. 545, 559-562, citing the relevant decisions of the Constitutional Court of the Russian Federation. Exh. 11.

35 "Luzhkov Vows To Flout Court Ruling," *RFE/RL Newsline*, (Mar. 11, 1998), available at <http://www.rferl.org/newsline/1998/03/110398.html>. Exh. 12.

36 For a comprehensive account of the Moscow *propiska* system, *see* Damian S. Schaible, *Life in Russia's 'Closed City': Moscow's Movement Restrictions and the Rule of Law*, 76 N.Y.U. L. REV. 344, 352-356 (Apr. 2001).

37 Human Rights Watch, "World Report 2001: The Russian Federation," available at <http://www.hrw.org/wr2k1/europe/russian.html>. Exh. 14.

38 Domestic Producers' at 5.

employers."[39] However, workers' right to strike is in fact reduced under the new Code, as, in the words of the Labor and Social Development Minister, Alexander Pochinok,

> *we have included a very harsh condition....If there are no documents proving that the majority support the strike, the strike is not legitimate.*[40]

D. Tripartite Agreements--Do they or don't they govern in Russia?

In the December 10 submission by the Russian steel producers, the existence of tripartite agreements to govern labor relations in Russia is vehemently refuted:

> *Furthermore, wages in Russia, for both the private and public sectors, are not set on the basis of a "tripartite arrangement," as they were in Hungary, the Slovak Republic, the Czech Republic and Latvia at the time that the Department analyzed those countries' status as market economies.*[41]

However, Russian steel producers now claim the exact opposite in their new submission, but provide no source for this new information:

> *There are, however, state, regional and local tripartite organizations that bring together representatives of employers, employees, and the state/municipal authorities to coordinate and reconcile the various groups' interests.*[42]

The conflicting data provided in the two Russian submissions underscores the nature of the *de facto* situation in Russia. Although tripartite arrangements exist, they have no power or influence to meaningfully facilitate or protect labor rights.[43]

Criterion 3: The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country.

As with the rest of Russian steel producers' submission, the *de facto* state of the Russian economy is not addressed in the discussion of foreign direct investment in Russia. While relying heavily on the written laws, the submission also cites the U.S. Commerce Service's Country Commercial Guide as showing that foreign joint ventures and direct investment is easily undertaken. However, this report actually highlights the problems with investing in Russia,

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39 Russian Steel Producers' Feb. 7 at 44.

40 "Remarks by Labor and Social Development Minister Alexander Pochinok at a Breakfast of the American Chamber of Commerce in Russia" *Federal News Service* (Jan. 23, 2002) (Letter from LeBoeuf, Lamb, Greene & MacRae to the U.S. Department of Commerce, Case No. A-821-816 at Exh. A (Feb.7, 2002)). Exh. 15.

41 Russian Steel Producers' Dec. 10 at 11.

42 Russian Steel Producers' Feb. 7 at 40.

43 Domestic Producers' at 15.

despite the existence of legal protections, since these protections are ineffective. Specifically, the report cited by Russian steel producers states that

> *Foreign investors participating in Russian privatization sales are often confined to limited positions and face problems with minority shareholder rights and corporate governance. The treatment of foreign investment in new privatizations is likely to remain inconsistent.*[44]

While the Russian steel producers erroneously cite to the Guide to support the claim that foreign investment is protected under the law,[45] they ignore the majority of the Guide's analysis which criticizes the fact that the laws are not implemented, even though they were passed in 1999.

> *However, in practice, these protections {of the 1999 law} have yet to be provided, for implementing regulations are still lacking. Tax and customs administrations still refuse to implement the law's provisions until corresponding changes have been made in tax and customs legislation, so these protections remain a dead letter.*[46]

In truth, this report only further supports Domestic Producers' contentions that the *de facto* state of treatment of foreign investment in Russia does not support graduation from NME status.

Additionally, Russian steel producers' claim that FDI per capita levels have greatly increased over the past several years is completely false. According to the EBRD's most recent report, published in November 2001, net FDI per capita levels fell in from 1997 to 2000, to *negative* inflows.[47] Furthermore, the data behind the "supporting" graph is not based on any traceable source -- for the six data points, Russian producers claim five general sources, but do not state which data came from which source, nor provide supporting exhibits.[48] The side-by-side comparison of the two graphs demonstrates the egregious discrepancy in the Russian steel producer's claim, Domestic Producers provided on the following page in Figure 3.

While the title of the Russian table is "estimate," the only agreement between the Russian steel producers and the EBRD are the figures for 1997 and 1998, when levels were falling. Either the remainder of the Russian table is based on outdated information, or was grossly misstated. Regardless, the fact that net FDI per capita in 2001 and 2000 were $13.76 and negative $2.38, respectively, underscores the fact that Russia's FDI inflows are not even near levels of recent NME graduates like the Czech Republic and Slovakia, whose 2000 FDI levels per capita were $437 and $278 respectively.

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44 Country Commercial Guide Russia at 60 (Russian Steel Producers' Feb. 7 Exh. 18). Exh. 5.

45 Russian Steel Producers' Feb. 7 at 76-77, n.189-192.

46 Country Commercial Guide Russia at 59 (Russian Steel Producers' Feb. 7 Exh. 18). Exh. 5.

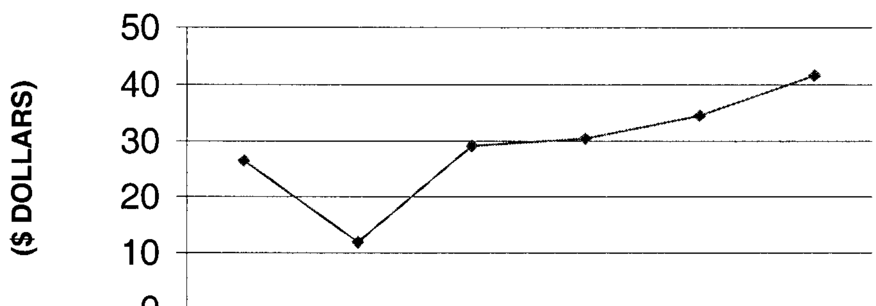
47 *Transition Report 2001* at 189. Exh. 18.

48 Russian Steel Producers' Feb. 7 at 92 (Figure 19).

FIGURE 3 FDI PER CAPITA DATA COMPARISONS

RUSSIAN STEEL PRODUCERS' FIGURE 19(p.92)

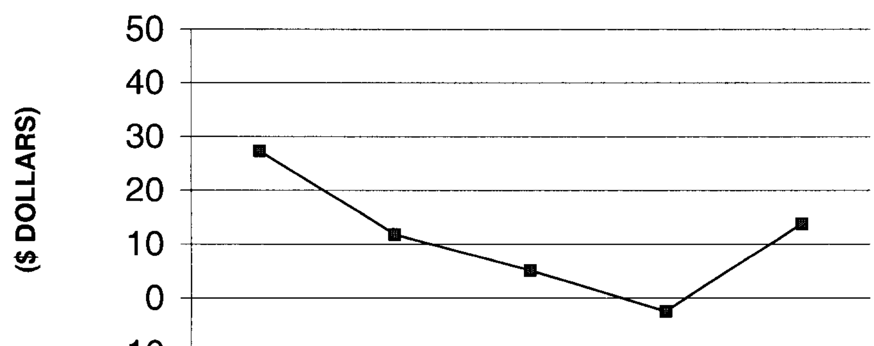
FDI PER CAPITA 1997-2002 EST. IN DOLLARS



	1997	1998	1999	2000	2001	2002
FDI per Capita	26.51	11.9	29.18	30.51	34.58	41.64

EBRD TRANSITION REPORT 2001

ACTUAL FDI PER CAPITA 1997-2001 IN DOLLARS



	1997	1998	1999	2000	2001
FDI per Capita	27.36	11.84	5.12	-2.38	13.76

Criterion 4: The extent of government ownership or control of the means of production.

Once more, the Russian steel producers' submission focuses on the *de jure* rather than the *de facto* state of the Russian economy when discussing the degree of government ownership and control of the economy, while ignoring the well-substantiated data submitted by the Domestic Producers. In the one instance where the most damaging evidence presented against this criterion has provoked a response by the Russian producers, that response consists of unsubstantiated and mostly irrelevant data.

The Russian steel producers allege for the first time that not only does the Russian private sector account for the majority of enterprises by number, but also in terms of GDP. The submission states that "{t}he share of goods and services produced by private enterprises in 2000 in Russia constituted 74.4 percent of Russian GDP," but provides no citation to support this claim. The next sentence states that "{s}ince 1997, Russia's private sector has created no less than 70 percent of the country's GDP," does provide a citation.[49]

Of course, *creation* of new GDP and the actual *percentage* of GDP are two very different things. The determination as to whether or not the Russian government exercises significant control over the means of production must be made based on the latter, not the former figure because the Department is judging the current state of the Russian economy, not its purported progress. Thus, the second sentence quoted is essentially irrelevant.

The bigger problem, however, is with the first sentence, which in essence represents the Russian steel producers' strongest argument in the section. However, to repeat, the document cited in the second quoted sentence does not provide backing for the crucial "74.4 percent GDP" figure from the first sentence, although the paragraph is structured to suggest that that it does so.[50]

It should also be noted that the article cited for the 70 percent GDP creation figure is written by Anders Aslund, an economist who used to be an advisor to the Russian Government, now sits on the Board of Directors of the quasi-governmental and scandal-ridden Russian Privatization Center, and who wrote and published a book back in 1995 very prematurely entitled How Russia Became a Market Economy.[51] The Department had disagreed with Mr. Aslund's subjective verdict in its 1995 Russia NME review, and it should do so again.[52]

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49 *Id.* at 110.

50 *Id.*

51 Anders Aslund, *How Russia Became a Market Economy* (Washington, DC: Brookings Institution, 1995). *See also* Naeem Mohaiemen, "The Harvard Boys: Adventures in Russia," *Daily Star* (Aug. 31, 1998).

52 *Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440, 16,443 (Mar. 30, 1995) (Notice of Final Determination at Sales Less Than Fair Value).

Other information provided in Russian steel producers' own exhibits contradict the claim that 74.4 percent of the GDP comes from the private sector. The oft-cited Country Commercial Guide Russia states that,

> *While UES and Gazprom are privatized, the GOR is a major shareholder in each. Together these natural monopolies account for around 13% of Russia's GDP.*[53]

This quote refutes two important contentions. First, if Gazprom, with a 38 percent GOR ownership share is considered "privatized" under these statistics, then there are many more businesses under government control than the statistics of "privatized enterprises" reveal. Second, if these monopolies account for 13 percent of GDP, then the extensive holdings of the government in other sectors could only amount to 12 percent of the GDP for the 74.4 percent figure to be accurate -- unless the Russian steel producers' figure includes UES and Gazprom profits as "privatized" contributions to the GDP. But no one even remotely familiar with the state of Russian industries since 1990 would attempt to argue that Gazprom is a private enterprise. In fact, Russian steel producers themselves later admit that Gazprom is not privatized: stating that "the Government of Russia is planning the restructuring and privatization of 'Gazprom' and 'RAO EES.'"[54]

There also some additional problems with the new information submitted by the Russian steel producers:

- Several of the companies targeted for privatization in the near future, according to Russian steel producers, have been on the privatization lists for many years, including such large enterprises as "Lukoil" and "Rosneft."
- Contrary to the Russian steel producers' claims that privatization in Russia is rapidly growing, their own data in Figure 23 demonstrate that the number of privatized companies in Russia had only grown by a paltry 2.79 percent from 2001 to 2002.[55]

Criterion 5: The extent of government control over the allocation of resources and over the price and output decisions of enterprises.

Following the general pattern of the submission, Russian steel producers concentrate on the *de jure* rather than the *de facto* situation in the Russian Federation. Some of their arguments in this section are also misleading or not relevant. For example, the Russian steel producers claim that the market capitalization of firms on the Russian stock exchange is above that of the five East European nations that had successfully graduated from NME status, presenting the relevant numbers in Figure 32.[56] But Russia dwarfs the small countries of Eastern Europe in

53 Country Commercial Guide Russia at 8 (Russian Steel Producers Feb. 7 Exh. 18). Exh. 5.

54 Russian Steel Producers' Feb. 7 at 106.

55 *Id.* at 111.

56 *Id.* at 138.

terms of population and GDP. Pointing out that market capitalization of Russian firms on the exchange is about three times higher than that of Czech Republic, a country with 1/15 of the population and 1/9 GDP level of the Russian Federation is hardly a convincing argument.[57]

Criterion 6: Such other factors as the administering authority considers appropriate.

For Russian steel producers to declare information which falls under the statutory category of "other factors" as "irrelevant to the statutory criteria" demonstrates a failure to understand the Department's statutory duty in non-market economy reviews. While all the criteria provided as "other factors" by Domestic Producers were taken directly from previous non-market economy reviews, Russian steel producers use this section to interject even more new information, not by rebutting any of Domestic Producers' arguments.

III. Conclusion

In light of all of the information that has been presented to the Department on the issue of Russia's status as a non-market economy, it is clear that Russia has failed to meet the statutory criteria set by Congress. Although Russian steel producers may analogize periods of U.S. history to the current conditions in Russia, these examples only further highlight the fact that Russia is not a market economy.[58]

The Department is instructed by Congress to place emphasis on the *de facto* state of affairs rather than *de jure* aspirations, and to view the state of the economy of the country as a whole. Russia has failed to demonstrate that it operates on market principles, and must therefore continue to be considered a non-market economy.

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57 "Czech Republic," "Russia," CIA World Factbook (2001), available at <http://www.cia.gov/cia/publications/factbook/index.html> (excerpt). Exh. 16.

58 *See, e.g.*, Russian Steel Producers' Feb. 7 at 141 (comparing present day Russia to the United States during the Grant administration).